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No. 05-1279

IN THE

Supreme Court of the United States

MIDWEST GENERATION, EME, LLC,
Petitioner,

v.

LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF THE UNION RESPONDENT

MARILYN S. TEITELBAUM
(Counsel of Record)
1221 Locust Street
St. Louis, MO 63102
(314) 621-2626

JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

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Respondent Local 15, International Brotherhood of Electrical Workers, AFL-CIO, submits this brief in opposition to the petition for certiorari filed by Midwest Generation, EME, LLC.

STATEMENT

In its most general terms, this case concerns the question of "when it is unlawful [under the National Labor Relations Act for an employer] to discriminate in a lockout between groups of workers." *NLRB v. Local 15, Int'l Broth. of Electrical Workers, AFL-CIO*, Sup. Ct. No. 05A879, App. for an Extension of Time p. 5.

To determine the answer to this question, the National Labor Relations Board "applie[d] the [analytical] framework developed by the Supreme Court in *NLRB v. Great Dane Trailers*, [388 U.S. 26 (1967)]," to the factual situation here. Pet. App. 29a. Similarly, in reviewing and reversing the Board's decision that Midwest's "discriminat[ion] in a lockout between groups of workers" was not unlawful, the Seventh Circuit agreed that this question is to be answered by following "[t]he basic procedure . . . first outlined by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967)." Pet. App. 6a.

Thus, the point of disagreement between the court below and the Board was over how the *Great Dane* framework should be applied to Midwest's discrimination in the lockout at issue here. And, the sole issue presented at this point is whether or not the court of appeals properly understood and applied this Court's teaching in *Great Dane* to the particular discriminatory lockout in this case. That issue arises in the following context.

On August 31, the Local 15 membership at Midwest Generation voted to end a two month strike against the Company and, through the Union, unconditionally offered to return to work. Pet. App. 3a. Midwest Generation did not immediately respond to the Union offer to return to work. *Ibid.* Instead, six days later, the Company informed the Union that it was locking out the employees who had struck except for those who had made individual offers to return to work prior to the strike's end. *Ibid.* Accordingly, the Company did not lock out the cohort of 61 bargaining unit employees who had made individual offers to return to work before August 31, including the six employees who had made such an offer but had not yet returned to work by that date. *Id.* at 2a. In contrast, the Company locked out the cohort of the bargaining unit employees who had stayed with the strike to its end and until the Union offered to return to work. *Id.* at 3a.

Under the *Great Dane* framework, once the Board found that Midwest's selective lockout, on its face, constituted discrimination based on union activity, the pertinent question became "whether Midwest has shown that its lockout had any business justification that was neither frivolous nor based upon an impermissible violation of section 7 rights." Pet. App. 9a.

The NLRB majority proffered two *possible* justifications for the Midwest's discrimination between those employees who made individual offers to return to work during the strike and those who made a collective offer to return through the Union at the strike's end. First, the Board majority suggested, even though not argued by Midwest, that the discrimination was "justified by operational needs." Pet. App. 32a. Second, the majority suggested that "the distinction made by the [Company] (nonstrikers and crossovers vs. those who stayed on strike)" was justified on the ground that "[t]he non-strikers and crossovers had decided that they did not wish to suffer the loss of pay associated with a strike" so that "it was no longer necessary for the [Company] to place additional pressure upon them in order for [the Company] to achieve its bargaining goals." *Id.* at 36a-37a. The court of appeals reversed the NLRB majority's conclusion in that regard on the ground that neither proffered justification had any evidentiary support in the stipulated record in this case.

With respect to the first justification, the court below held that "to justify a partial lockout on the basis of operational need, an employer must provide a reasonable basis for finding some employees necessary to continue operations and others unnecessary." Pet. App. 13a. The court found that "Midwest offered no proof that its operational needs justified the partial lockout." *Id.* at 10a. In the first place, the parties had stipulated "that Midwest's operational needs were being 'successfully maintained . . . through the efforts of supervisory personnel, contractors, and some temporary replacements.'"

Ibid. quoting Statement of Stipulated Facts ¶ 18. The court also observed that "the last six crossover employees did not even start work until after the August 31 unconditional offer to return to work, which demonstrates that these employees were unnecessary for continued operations." *Ibid.*

With respect to the second justification—"that [the Company] allowed the non-strikers and crossovers to return to work because they 'had removed themselves from the Union's economic action,' making it unnecessary to pressure them into abandoning the Union's bargaining position, Pet. App. 14a"—the court concluded that "the Board's claim that additional pressure was necessary for one group, but not another, is unsupportable," *id.* at 15a. The court observed that "at the time of the lockout, all employees had offered to return to work" and that "[t]he only distinction between employees was whether an individual worker had made his or her offer to return as part of the Union's action or individually." *Ibid.* Thus, "[n]othing ha[d] been presented to distinguish the motivation of those who offered to return to work before August 31 and those who offered to return to work after August 31." *Ibid.*

The court concluded by noting that "[n]ot only has Midwest failed to put forth a legitimate and substantial business justification, but in its attempts to justify the partial lockout it has given further support to the Union's claim that the lockout was used in retributive fashion to discourage employees from exercising their section 7 right to strike." Pet. App. 17a-18a. This is so, the court explained, because Midwest was claiming the right to engage in a "discriminatory lockout on the basis of a protected activity," and such discrimination "is unlawful even when it is supportive of an employer's bargaining position." *Id.* at 16a. In this regard, the court observed, "Merely because retribution against strikers may be effective does not make such actions legitimate and substantial." *Id.* at 18a.

ARGUMENT

The Seventh Circuit's decision soundly applies the principles of this Court's decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), to the particular discriminatory lockout situation presented here. The decision below is, moreover, precisely in line with the D.C. Circuit's more recent decision in the closely analogous case of *United Steel Workers v. NLRB*, No. 04-1435, 2006 U.S. App. LEXIS 11221 (D.C. Cir. April 28, 2006). Contrary to the assertions of the certiorari petition, the Seventh Circuit's decision is not in conflict with the decision of any other circuit nor is it in tension with any decision of this Court. The petition should therefore be denied.

1. "Under [NLRA] § 8(a)(3), it is unlawful for an employer by discrimination in terms of employment to discourage 'membership in any labor organization,' which includes discouraging participation in concerted activities, such as a legitimate strike." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). This Court's *Great Dane* decision elaborates on that § 8(a)(3) rule by holding that "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." 388 U.S. at 34 (emphasis in original).

Following the teachings of *Great Dane*, the Seventh Circuit held that "to justify a partial lockout" that is discriminatory on its face, an employer must provide "evidence of a 'legitimate and substantial' basis for distinguishing between those employees it locked out and those it did not." Pet. App. 13a & 16a. "If an employer can show no legitimate and substantial business justification, the lockout is presumptively an unfair labor practice under . . . the *Great Dane* analysis." *Id.* at 8a. And, applying these teachings here, the court of

appeals held that because "employees were locked out . . . on the basis of their Union activities," rather than on some other, legitimate basis, the Company's "action was based upon invalid anti-union motivations" and thus was an unfair labor practice. *Id.* at 19a.

The correctness of the Seventh Circuit's understanding of *Great Dane* is confirmed by the D.C. Circuit's recent decision in the closely analogous case of *United Steel Workers v. NLRB*, No. 04-1435, 2006 U.S. App. LEXIS 11221 (D.C. Cir. April 28, 2006). In *United Steel Workers*, the D.C. Circuit reversed the NLRB's decision in *Bunting Bearings Corp.*, 343 NLRB No. 64 (2004). As the Solicitor General has explained, *Bunting Bearings* is a case in which "[t]he Board also applied its approach"—first developed in this case—"to determining when it is unlawful to discriminate in a lockout between groups of workers." *NLRB v. Local 15, Int'l Broth. of Electrical Workers, AFL-CIO*, Sup. Ct. No. 05A879, App. for an Extension of Time p. 5.

The employer in *Bunting Bearings* "selectively locked out Union member employees [and not nonmember employees] in the wake of failed negotiations over the renewal of a collective bargaining agreement." *United Steel Workers*, 2006 U.S. App. LEXIS 11221, p. *2. The Board held "that the lockout was lawful because its purpose was to 'pressure [the] union to accept [Bunting's] bargaining proposals.'" *Id.* at *3, quoting *Bunting Bearings*, 343 NLRB No. 64 at 16. The D.C. Circuit, as did the Seventh Circuit in the instant case, held that "the Board's conclusion that the lockout was lawful is inconsistent with the controlling precedent the Supreme Court set forth in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967)." *Id.* at 3-4.

The D.C. Circuit, like the Seventh Circuit in this case, read *Great Dane* as holding "that if an employer has 'engaged in discriminatory conduct which could have adversely affected employee rights to some extent,' the employer must 'establish

that he was motivated by legitimate objectives." 2006 U.S. App. LEXIS 11221, p. *4. "Accordingly," the D.C. Circuit concluded, "the burden was on Bunting to present evidence showing that the [selective] lockout was motivated by legitimate objectives." *Ibid.* Given that "Bunting did not even attempt to do this," the D.C. Circuit held that "it was not appropriate for the ALJ or the Board to speculate upon what might have motivated Bunting." *Ibid.* (quotation marks and citation omitted).

2. The D.C. Circuit's decision in *United Steel Workers* conclusively refutes Midwest's assertion that the decision below creates a conflict between the Seventh Circuit and the D.C. Circuit over the correct application of *Great Dane* in determining the legality of a discriminatory lockout. Pet. 15-18. Indeed, on analysis, there is nothing to Midwest's assertion that the earlier D.C. Circuit decisions the Company cites conflicted in principle with the Seventh Circuit's decision here. Pet. 18-22.

Those D.C. Circuit cases stand only for the proposition "that an *across-the-board lockout* 'as a means to bring economic pressure to bear in support of the employer's bargaining position,' [*American Ship Building Co. v. NLRB*,] 380 U.S. [300,] 308 [(1965)], is *categorically* not 'inherently destructive' [of NLRA-protected employee rights]." *Local 702, International Broth. of Electrical Workers v. NLRB*, 215 F.3d 11, 16 n. 1 (D.C. Cir. 2000) (first emphasis added, second emphasis in original). And, in adopting that position, the D.C. Circuit recognized that the *American Ship Building* line of "across-the-board lockout" decisions covers only those cases in which "[*a*]*ll employees are treated alike* both during and after the conflict." *Boilermakers Local 88 v. NLRB*, 858 F.2d 756, 764 (D.C. Cir. 1988) (emphasis added).

Indeed, anticipating the Seventh Circuit's decision in this case and its own later *United Steel Workers* decision, the D.C. Circuit had noted that a "lockout . . . directed . . . to specific

employees engaged in specific [protected] acts" is unlawful under NLRA § 8(a)(3), *Local 702*, 215 F.3d at 19, and had suggested that an employer may "not distinguish among the members of the bargaining unit" by conducting a selective lockout in which there is a "correlation between degree of union activity and negative consequences to union activists," *International Paper Co. v. NLRB*, 115 F.3d 1045, 1050-51 (D.C. Cir. 1997).[1]

3. While the certiorari petition does not claim that the decision below conflicts with any decision of this Court, it does suggest, in the most tentative fashion, that the decision below "undermines" and "is at odds with" *Trans World Airlines, Inc. v. Independent Fed. of Flight Attendants*, 489 U.S. 426 (1989)—a Railway Labor Act precedent that the Board majority did not so much as cite in its decision. Pet. 10. That suggestion is untenable.

The *TWA* case did not involve a lockout at all. The issue in *TWA* was whether the employer could honor its "assurance . . . to those who accepted employment during the strike that if they so desired their places might be permanent." 489 U.S. at 433. The Court held that the employer could honor such assurances and that, as a result, "[t]he positions occupied by newly hired replacements, employees who refused to strike,

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[1] *Accord NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 58 (2d Cir. 1999) (the generally "legitimate tactic" of locking out employees in support of bargaining demands "violates § 8(a)(1) of the Act" where the employer "discriminat[es] against its employees for exercising their right[s] under § 7"); *NLRB v. Centra, Inc.*, 954 F.2d 366, 373 (6th Cir. 1992) ("actions distinguishing among workers based on participation (or lack of participation) in a protected activity" are "inherently destructive"); *National Fabricators, Inc. v. NLRB*, 903 F.2d 396, 400 (5th Cir. 1990) (an employer "may not discriminate against certain employees merely because it anticipates that they will honor a picket line or otherwise engage in protected activity").

and employees who abandoned the strike" were "simply not 'available positions' to be filled" by returning strikers. *Id.* at 438.

Midwest has not claimed that there were not available positions for the returning strikers. Rather, the Company's position is that it was entitled to discriminate against the strikers in conducting a lockout because they stayed with the Union's strike until it ended. Thus, *TWA* has nothing whatsoever to do with this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARILYN S. TEITELBAUM
(Counsel of Record)
1221 Locust Street
St. Louis, MO 63102
(314) 621-2626

JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006